Jumbo Top Sdn Bhd v Automotive Corp (M) Sdn Bhd

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO MT3–22–942 OF 2005
ROSNAINI SAUB JC
24 AUGUST 2007

Civil Procedure — Injunction — Interim injunction — Dealership agreement revocable in nature — Whether such agreement specifically enforceable — Whether proper to grant injunction in view of nature of agreement — Specific Relief Act 1950 s 20(1)(d)

Civil Procedure — Injunction — Interim injunction — Whether there were serious questions to be tried — Whether damages an adequate remedy

Contract — Specific performance — Specific Relief Act 1950 s 20 — Nature of contract — Contract revocable in nature — Whether such contract capable of specifically enforceable — Specific Relief Act 1950 s 20(1)(d)

Evidence — Without prejudice communications — Admissibility — Letters intended on a without prejudice basis — Minutes of meeting to negotiate settlement — Whether such documents admissible as evidence

By a dealership agreement, the defendant appointed the plaintiff as its dealer in respect of certain vehicles in the Taman Melawati/Ampang area. The defendant, through a notice of termination, subsequently terminated the plaintiff's dealership. The plaintiff sued the defendant alleging wrongful termination of the dealership agreement. The plaintiff applied for an interim injunction to prohibit the defendant from appointing new or other dealers in the Taman Melawati/Ampang area pending disposal of its suit. The plaintiff, alleged inter alia, that the dealership agreement gave it an exclusive right to be the defendant's dealer in the said area. At the commencement of the hearing of the plaintiff's application, counsel for the defendant raised a preliminary objection concerning the admissibility of certain letters and minutes of a meeting between the parties. Copies of those documents were exhibited in the plaintiff's affidavit. The High Court had thus to consider whether: (i) the defendant's preliminary objection was well-taken; and (ii) the plaintiff should be granted the interim injunction.

Held, allowing the defendant's preliminary objection and dismissing the plaintiff's application with costs:

(1) The letters were clearly intended to be on a without prejudice basis. They were therefore inadmissible as evidence. The minutes of the meeting related to a meeting held between the parties in an attempt to negotiate a settlement. Thus, what transpired at the meeting should not be admitted as evidence (see para 4); *Dusun Desaru Sdn Bhd v Wang A Yu* [1999] 5 MLJ 449 referred.

(2) There were certainly serious questions to be tried in the instant case, such as: (i) whether the defendant's mode of termination was valid; (ii) whether the termination was done according to the terms of the dealership agreement; (iii) whether the dealership agreement conferred upon the plaintiff any exclusive rights. The High Court would however refrain from determining the merits of such issues at the hearing of the application stage, and instead determine them at the trial of the action (see para 6); *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah* [1995] 1 MLJ 193 followed.

(3) If the plaintiff succeeded at trial, it would certainly be adequately compensated by an award of damages for the loss suffered as a result of the wrongful termination of the dealership agreement. Damages for the plaintiff's loss of reputation and goodwill, could also be properly assessed by the court assuming that damages for such losses were recoverable. The plaintiff would also be adequately compensated with damages if it succeeded in proving that the dealership agreement gave it exclusive dealership rights as claimed. The plaintiff had not shown that the defendant was not in a financial position to pay damages the court would award, in the event the plaintiff succeeded in its action (see paras 10–11); *American Cyanamid Co v Ethicon* [1975] AC 396 followed and *Pekeliling Triangle Sdn Bhd & Anor v Chase Perdana Bhd* [2003] 1 MLJ 130 referred.

(4) It was inappropriate to grant the interim injunction in view of cl 7.4 of the dealership agreement which allowed either party to terminate the dealership agreement at any time with the appropriate notice. Further, s 20(1)(d) of the Specific Relief Act 1950 was applicable and prevented the plaintiff from specifically enforcing the agreement (see para 12).

[Bahasa Malaysia summary

Melalui satu perjanjian pengedaran, defendan telah melantik plaintif sebagai pengedarnya berkaitan beberapa kenderaan tertentu di kawasan Taman Melawati/Ampang. Defendan, melalui satu notis penamatan, kemudiannya telah menamatkan pengedaran plaintif. Plaintif telah menyaman defendan

dengan mengatakan penamatan perjanjian pengedaran itu adalah salah. Plaintif telah memohon satu injunksi interim untuk menghalang defendan daripada melantik pengedar baru atau lain di kawasan Taman Melawati/Ampang sementara menunggu guamannya selesai. Plaintif mengatakan antara lain bahawa perjanjian pengedaran tersebut memberikan hak eksklusif untuk menjadi pengedar defendan di kawasan tersebut. Di permulaan perbicaraan permohonan plaintif, peguam bagi pihak defendan telah menimbulkan satu bantahan awal berhubung penerimaan masuk surat-surat tertentu dan minit mesyuarat antara pihak-pihak. Salinan dokumen-dokumen tersebut telah diekshibitkan dalam afidavit plaintif. Mahkamah Tinggi oleh demikian perlu mempertimbangkan sama ada: (i) bantahan awal defendan dapat diterima; dan plaintif patut diberikan injunksi interim tersebut.

Diputuskan, membenarkan bantahan awal defendan dan menolak permohonan plaintif dengan kos:

(1) Surat-surat tersebut dengan jelas berniat berasaskan tanpa prejudis. Oleh itu ianya tidak boleh diterima sebagai keterangan. Minit mesyuarat berkaitan suatu mesyuarat yang diadakan di antara pihak-pihak dalam percubaan untuk merundingkan satu penyelesaian. Oleh itu, apa yang berlaku dalam mesyuarat itu tidak patut diterima masuk sebagai keterangan (lihat perenggan 4); *Dusun Desaru Sdn Bhd v Wang A Yu* [1999] 5 MLJ 449 dirujuk.

(2) Sememangnya terdapat persoalan-persoalan serius yang perlu dibicarakan dalam kes semasa, seperti: (i) sama ada cara penamatan defendan adalah sah; (ii) sama ada penamatan yang dibuat adalah menurut terma-terma perjanjian pengedaran; (iii) sama ada perjanjian pengedaran memberikan plaintif apa-apa hak eksklusif. Mahkamah Tinggi bagaimanapun tidak akan menentukan merit isu-isu sedemikian dalam perbicaraan di peringkat permohonan, dan sebaliknya menentukannya semasa perbicaraan tindakan itu (lihat perenggan 6); *Keet Gerald Francis Noel John v Mohd Noor Bin Abdullah* [1995] 1 MLJ 193 diikut.

(3) Sekiranya plaintif berjaya dalam perbicaraan tersebut, ia akan diberikan pampasan secukupnya melalui satu award ganti rugi kerana kerugian yang dialami akibat penamatan salah perjanjian pengedaran tersebut. Ganti rugi untuk kehilangan reputasi dan nama baik plaintif boleh juga ditaksirkan dengan sewajarnya oleh mahkamah dengan mengandaikan bahawa ganti rugi untuk kerugian sedemikian boleh dapat balik. Plaintif juga diberi pampasan dengan ganti rugi jika ia berjaya membuktikan bahawa perjanjian pengedaran tersebut memberinya hak eksklusif sepertimana yang didakwa. Plaintif tidak menunjukkan yang

defendan bukan berada dalam kedudukan kewangan yang mampu membayar ganti rugi yang mahkamah awardkan, sekiranya plaintif berjaya dalam tindakannya (lihat perenggan 10–11); *American Cyanamid Co v Ethicon* [1975] AC 396 diikut dan *Pekeliling Triangle Sdn Bhd & Anor v Chase Perdana Bhd* [2003] 1 MLJ 130 dirujuk.

(4) Adalah tidak sesuai untuk memberikan injunksi interim berdasarkan fasal 7.4 perjanjian pengedaran yang membenarkan mana-mana pihak menamatkan perjanjian pengedaran pada bila-bila masa dengan notis yang sewajarnya. Bahkan, s 20(1)(d) Akta Relif Spesifik 1950 boleh digunakan dan menghalang plaintif daripada menguatkuasakan perjanjian tersebut secara spesifik (lihat perenggan 12).]

Notes

For cases on admissibility of without prejudice communications, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2583–2596.

For cases on interim injunction, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3115–3187.

For cases on Specific Relief Act 1950 s 20, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 5142–5143.

Cases referred to

American Cyanamid Co v Ethicon [1975] AC 396 (folld)

Dusun Desaru Sdn Bhd v Wang A Yu [1999] 5 MLJ 449 (refd)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah [1995] 1 MLJ 193 (folld)

Pekeliling Triangle Sdn Bhd & Anor v Chase Perdana Bhd [2003] 1 MLJ 130 (refd)

Legislation referred to

Specific Relief Act 1950 s 20(1)(d)

Jeremy Lee (Malik Imtiaz Sawar) for the plaintiff.
Pang Kong Leng (Cheong Su Yin with him) (Cheah Teh & Su) for the defendant.

Rosnaini Saub JC:

DECISION (ENCL 3)

[1] In this action, the plaintiff is alleging that the defendant had wrongfully terminated the dealership agreement entered between them. The dealership agreement called the Vehicles Sales Dealer Agreement was entered by the parties on 13 September 2002. The plaintiff was appointed as dealer in the sale and promotion of Isuzu and HICOM vehicles in Taman

Melawati/Ampang pursuant to the said agreement. On 5 August 2005, the defendant issued and served on the plaintiff a notice of termination of the said dealership agreement.

[2] By this summons in chambers (encl 3), the plaintiff is basically seeking an interim injunction to prevent the defendant from appointing other party or parties as dealer of those vehicles in Taman Melawati/Ampang pending the disposal of this action. The plaintiff, inter alia, is alleging that the dealership agreement gave them exclusive right to be the dealer in the area.

[3] Counsel for both parties have filed in their main submissions and followed by several more of their respective submissions in reply. Suffice it to say I have given due considerations to all the submissions of counsels.

[4] I would first briefly touch on the preliminary objection raised by the defendant's counsel on admissibility of certain correspondences and minutes of meeting between the parties exhibited by the plaintiff in its affidavit. After considering the respective submissions of counsel for both sides, I am of the opinion that there is merit in the objection taken up by the defendant's counsel. The relevant correspondences, ie the defendant's letters to the plaintiff dated 29 August 2005 and 6 September 2005 were clearly intended to be on a without prejudice basis and therefore inadmissible as evidence. Having regards to the surrounding circumstances that led to the meeting between the parties on 20 September 2005, it is also my finding that the said meeting was part of the process of negotiation to find an amicable settlement between the parties regarding the termination of the dealership agreement. As such what transpired at the meeting should not be admitted as evidence — see *Dusun Desaru Sdn Bhd v Wang A Yu* [1999] 5 MLJ 449**.**

[5] I therefore upheld the objection raised by the defendant's counsel. defendant's counsel urge me to order costs against the plaintiff on the preliminary objection but I do not think I should accede such a request at this stage.

[6] Coming to the merits of the plaintiff's application for the interim injunction, I think it can be safely said that there are certainly some serious issues to be tried in this case. One of the main issues will be whether the defendant's termination of the dealership agreement vide its letter dated 5 August 2005 is valid or not. The other will be whether the termination was done in accordance with the provisions of the dealership agreement. Another contentious issue in this case is whether the dealership agreement gave the plaintiff exclusive right to be dealer of Isuzu and HICOM vehicles in Taman Melawati/Ampang. Following the decision of *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah* [1995] 1 MLJ 193, I should refrain from

A determining the merits of such issues at this stage where only affidavits evidence are considered. Those questions should only be decided at the trial of the action.

B **[7]** The more pertinent and relevant question that I think will determine the fate of the plaintiff's application is whether in this case, damages would be the more appropriate remedy. In the oft-quoted case of *American Cyanamid Co v Ethicon* [1975] AC 396**,** Lord Diplock at p 408 said as follows:

C > … the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial.

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[8] The learned Law Lord then continued to state what happened if damages is found to be an adequate remedy, as follows:

E > If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, *no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage.*
>
> (Emphasis added.)

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[9] This passage from the judgment of Lord Diplock was reaffirmed by our Court of Appeal in *Pekeliling Triangle Sdn Bhd & Anor v Chase Perdana Bhd* [2003] 1 MLJ 130.

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[10] Perusing the plaintiff's statement of claim, it is clear that the plaintiff's cause of action is primarily based on the alleged wrongful termination of the dealership agreement — see para 13 of the plaintiff's statement of claim. In my opinion if the plaintiff succeeds at the trial of the action to prove that H the dealership agreement was wrongly terminated by the defendant, the damages suffered by the plaintiff can be assessed and quantified. Therefore, the plaintiff will certainly be adequately compensated by an award of damages for the loss it will suffer as a result of the wrongful termination of the dealership agreement. It is also my opinion that even the alleged loss I of reputation and the like can be appropriately assessed by the court; assuming of course that damages for loss of reputation and goodwill is recoverable in an action for wrongful termination of the agreement.

[11] Similarly, the plaintiff can also be adequately compensated with damages if it succeeds in proving that the dealership agreement gave it exclusive right to be dealer of Isuzu and HICOM vehicles in Taman Melawati/Ampang. Furthermore, the plaintiff had not at all shown that the defendant is not in a financial position to pay whatever damages that the court may award in the event the plaintiff is successful in its claim.

[12] There is also the peculiar feature of the dealership agreement that I think make it inappropriate for this court to grant the interim injunction sought by the plaintiff. Clause 7.4 of the agreement specifically provides that either party may terminate the agreement at any time by giving two months" prior notice in writing to the other. I agree with the counsel for the defendant that s 20(1)(d) of the Specific Relief Act 1950 is applicable to our present case; in that the said section applies to a contract that is revocable or determinable unilaterally by either party, regardless of whether it is a fixed term contract or a contact without any specific duration. In such a situation, the plaintiff herein will not be entitled to specific performance of the contract. It is also inappropriate to grant the interim injunction sought by the plaintiff when the defendant (and indeed the plaintiff themselves) is entitled to terminate or determine the dealership agreement at any time by giving the appropriate notice.

[13] In the premises and base on the reasons stated, I hereby dismissed the plaintiff's application in encl 3 with costs.

Defendant's preliminary objection allowed. Plaintiff's application dismissed with costs.

Reported by Andrew Christopher Simon